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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Vince Chhabria, Judge

IN RE: FACEBOOK, INC. )  
CONSUMER PRIVACY USER PROFILE )  
LITIGATION, ) MD 18-02843 VC  
\_\_\_\_\_)

San Francisco, California  
Thursday, August 23, 2018

**TRANSCRIPT OF PROCEEDINGS**

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**BY: CHRISTOPHER B. LEACH**

1 Thursday - August 23, 2018

10:30 a.m.

2 P R O C E E D I N G S

3 ---000---

4 **THE CLERK:** Give me one minute. I need to call  
5 CourtCall for this one.

6 **THE COURT:** Okay.

7 **THE CLERK:** Counsel in the *Facebook* matter, you can  
8 come on up and set up. I'm just trying to get CourtCall on the  
9 line.

10 Kristen, with Judge Chhabria, in San Francisco.  
11 (Discussion off the record.)

12 **THE CLERK:** You have two people on the line. Is that  
13 right? Okay. We'll probably have -- I'm just going to need to  
14 mute the incoming volume, unless the Judge sounds like he wants  
15 to have counsel talking. That's just for your information.  
16 And as soon as we end the case, we can go ahead and hang up.  
17 One second. I need to make them live. Thanks. Can you hear  
18 me? Hello? I'm going to call the case now.

19 Calling Case Number 18-MD-02843, In Re: Facebook, Inc.,  
20 Consumer Privacy User Profile Litigation. Counsel, please  
21 state your appearances for the Record.

22 **MR. LOESER:** Derek Loeser, from Keller Rohrbach, for  
23 the plaintiffs.

24 **MS. WEAVER:** Lesley Weaver, Bleichmar Fonti & Auld,  
25 for plaintiffs.

1           **MR. LIPSHUTZ:** And Joshua Lipshutz, for the  
2 defendant. And I believe we have Mr. Snyder on the phone, as  
3 well, perhaps calling from Istanbul.

4           **THE COURT:** Mr. Snyder, what time is it in Istanbul?

5           **MR. SNYDER:** Your Honor, I'm actually taking off in a  
6 couple of hours, so -- but it's ten hours further ahead.

7           **THE COURT:** That's not too bad. So --

8           **MR. SNYDER:** I'm officiating at a wedding,  
9 Your Honor, in Istanbul. So I'm very excited about that.

10          **THE COURT:** I hope you have a great trip.

11          **MR. SNYDER:** Thank you, Judge.

12          **THE COURT:** Okay. So --

13          **THE CLERK:** Do you want to keep them live on the  
14 phone?

15          **THE COURT:** No. You should definitely mute  
16 Mr. Snyder.

17          (Laughter in the courtroom.)

18          **MR. LIPSHUTZ:** Is that as a general matter,  
19 Your Honor, or --

20          **THE COURT:** That's under submission.

21          So obviously I've looked more closely at this case than I  
22 had the last time we met, but I have not looked nearly as  
23 closely at it as the next time we meet -- right? -- which  
24 presumably will be or potentially will be a hearing on a motion  
25 to dismiss. So you have to take, you know, everything I say

1 here with a grain of salt. I have not done a super deep dive  
2 into the issues, and into the question of standing, and into  
3 the merits; but I guess where -- I guess I find -- based on  
4 where I am now, I find the question of whether to allow  
5 discovery a bit more difficult than I did, you know, last time  
6 we met.

7 It's -- regardless of how we judge what happened from a  
8 moral or an ethical standpoint, it's not obvious to me how  
9 Facebook violated the law. And if Facebook violated the law,  
10 it's not obvious to me how people were "injured" by it, in the  
11 Article III, Federal Court sense of the word. Right? There's  
12 a very particular definition of "injury" for purposes of  
13 Article III standing doctrine -- right? -- which is different  
14 from sort of regular-person understanding of the word "injury,"  
15 perhaps.

16 So I guess what I want to hear from you -- from the  
17 plaintiffs -- is, you know, what is your best argument for  
18 standing right now? And what is your best argument for why you  
19 will have a claim on the merits against Facebook that will get  
20 past 12(b)(6)?

21 **MR. LOESER:** You want to take that?

22 **MS. WEAVER:** Good morning, Your Honor.

23 A significant question. So as a threshold matter --

24 **THE COURT:** I won't hold you to it. If you want to  
25 lead with something different in January, that's fine; but as

1 you sit here --

2           **MS. WEAVER:** As long as opposing counsel doesn't hold  
3 me to it.

4           **THE COURT:** As you sit here now.

5           **MS. WEAVER:** Well, first, as a very simple economic  
6 matter, there are out-of-pocket damages for people who paid for  
7 credit monitoring following the Cambridge Analytica  
8 revelations. We'll have clients pleading those claims.

9           **THE COURT:** Why would it be reasonable for them to  
10 pay for credit monitoring following the Cambridge Analytica  
11 revelations?

12           **MS. WEAVER:** Because the scope of the information and  
13 data that has been released is far beyond the scope and data of  
14 information that is even regularly alleged in cases of regular  
15 data breach. If you'll -- if you'll give me a moment to  
16 describe the kinds of things that have been collected, I think  
17 Your Honor might understand.

18           And, of course, the standard under *Spokeo* is concrete, or  
19 particularized, or actual, or imminent. And I'm going to give  
20 you some examples of each of those.

21           **THE COURT:** I don't think that's right. I think it's  
22 concrete and particularized.

23           **MS. WEAVER:** Okay. Concrete and particularized.

24           I think we satisfy all of these.

25           So let's start, for just example, with the HUD Complaint

1 that was actually -- we referenced in the earlier hearing that  
2 the Complaint was filed on Friday. The Department of Justice  
3 joined that. So in that very narrow example, Facebook allowed  
4 advertisers to check off certain boxes for people they wanted  
5 to target. And among those boxes was race. And let's just  
6 stick with just race, although the claims asserted in that  
7 Complaint are broader. They have to do with single mothers not  
8 having access to advertising.

9 So the claim that HUD is bringing is that Facebook  
10 violated the law, in allowing advertisers only to target people  
11 of a certain race. That's a violation of law.

12 I, as a Facebook --

13 **THE COURT:** But wait a minute.

14 **MS. WEAVER:** Yeah.

15 **THE COURT:** The question that you're supposed to be  
16 answering right now, I think, is --

17 **MS. WEAVER:** I was discriminated --

18 Yeah.

19 **THE COURT:** Why should somebody be paying --  
20 We're talking about standing.

21 **MS. WEAVER:** Right.

22 **THE COURT:** And you are saying that an injury that  
23 some plaintiffs asserted is that they had to pay for credit  
24 monitoring. So what does this have to do with somebody's need  
25 to pay for credit monitoring?

1           **MS. WEAVER:** Fair enough. This is a different  
2 example of harm. And if you'll allow me --

3           **THE COURT:** Okay.

4           **MS. WEAVER:** -- let me just finish with the HUD, and  
5 then we can come back to the credit monitoring, because of the  
6 scope of what was revealed.

7           So this first example is: I sign up for Facebook. They  
8 tell me I'm going to decide what is -- you know, what is  
9 revealed to third parties. I control my Privacy Settings.

10          And instead, what happens is I was discriminated against  
11 by Facebook because -- by my race, or some subset of people, as  
12 they decide what -- how advertisers can choose to advertise and  
13 target information to me.

14          That's a real and credible harm. Discrimination is a real  
15 and credible harm.

16          Two. The credit monitoring.

17          The scope of the information collected here is an  
18 egregious intrusion into the right of privacy. Facebook is not  
19 just collecting and sharing basic attributes, like where you  
20 live and where your friends are. They allow third parties  
21 to -- they enter into relationships where they allow third  
22 parties to access Facebook's own database, and match the  
23 database of the advertiser with Facebook's advertising base,  
24 and then target people specifically.

25          And the collection doesn't just occur from you.



1           **THE COURT:** But I still haven't heard anything that  
2 would cause somebody reasonably to conclude that they need to  
3 pay for credit monitoring.

4           **MS. WEAVER:** Okay. Well, they are -- for example,  
5 Facebook has reached data-sharing partnerships with at least 60  
6 device makers. The allegations include --

7           And it depends --

8           I'm now going up to the very high level, instead of the  
9 very specific level.

10          They are reading e-mail. They are reading the messages of  
11 the Facebook Messengers. That is going out to third parties.  
12 Anybody who wanted -- if I am e-mailing in a private forum --

13          **THE COURT:** When you say, "Reading e-mail" --

14          **MS. WEAVER:** Yes.

15          **THE COURT:** -- what do you mean by that?

16          **MS. WEAVER:** It means --

17          **THE COURT:** What does that mean: Reading e-mail?

18          **MS. WEAVER:** It means that they have the ability to,  
19 in real time, see the message or the communication, and use  
20 that information to create a digital profile of who you are.

21          I mean, in some larger sense, this is identity theft that  
22 is so far beyond just your Social Security number. It is so  
23 far beyond it, that they have --

24          You have -- basically, every Facebook user has an  
25 equivalent of a digital profile or avatar that --

1           **THE COURT:** Right. So information that one would use  
2 to target advertising at you.

3           But you say it's so much larger than a Social Security  
4 number; but as far as I can tell, it doesn't include the Social  
5 Security number.

6           **MS. WEAVER:** Well, for example, as recently as  
7 April 2018 Facebook was seeking medical data from hospitals.  
8 They asked major US hospitals to share -- they say "anonymized  
9 data" about their patients, such as illness and prescription  
10 info for a proposed research project.

11           They say that they've suspended that, but what they are  
12 doing with the data that they get from LendingClub and from  
13 other parties is matching the database that they have. And  
14 it's not anonymized. What they can do is actually match it to  
15 the individuals.

16           And so then there is -- medical data is also, for purposes  
17 of Article III standing, good grounds to find that there is  
18 threat of imminent injury or actual injury. And that is an  
19 example there with the health monitoring, but also with other  
20 financial institutions that are targeting the individuals.

21           So on its face, the collection and aggregation of these  
22 intimate details is -- is highly personal. And when you  
23 compare this to the kinds of invasions of privacy that other  
24 Courts have found give Article III standing, like the right to  
25 authorize an employer to gain access to employment history --

1 that has already been collected. And is sitting there.

2 Or in *Vizio*, for example, they're tracking the movements  
3 of users on the Web. Article III standing was there.

4 Facebook admits that it collects credit-card information.  
5 So that is information that is collected.

6 **THE COURT:** Well, but it's not about Facebook  
7 collecting information.

8 It's about Facebook sharing information with third  
9 parties. Right?

10 **MS. WEAVER:** Well, it's about sharing and targeting.  
11 This is the next thing. This is about the ability to  
12 manipulate Facebook users; so beyond the scope of, *I am being*  
13 *targeted by somebody who knows everything about me.* And  
14 there's no disclosure about who's doing the targeting.

15 So it's an entire field of study that's called  
16 "psychographic metrics." And it was the basis for the work of  
17 Cambridge Analytica. They understand the psychological profile  
18 about predicting how people will react to certain stimulus.  
19 And that's the data that Facebook has gathered. And it's used  
20 on Facebook to get people to act. Sometimes it's purchases.  
21 Sometimes it's other choices.

22 So -- and the data that's collected is so --

23 Here's an example. In 2017 *The Australian* reported on a  
24 23-page document created by Facebook employees, which documents  
25 Facebook's algorithms, and allowed advertisers to pinpoint

1 moments when young people need a confidence boost. There's a  
2 litany of teen emotional states, this document says, that the  
3 company claims it can estimate based on how teens use the  
4 service, including worthless, unsure, defeated, anxious, silly.

5 **THE COURT:** What's illegal about what you just  
6 described?

7 **MS. WEAVER:** So what's illegal about it is that  
8 that -- that was not consented to. Like, *Oh, we are going to*  
9 *use the information of your communications with your friends to*  
10 *develop a profile for you, and then we will allow third parties*  
11 *access to that, to target very narrow messages to you to*  
12 *manipulate your behavior, without telling you where the*  
13 *messages are coming from.*

14 **THE COURT:** Well --

15 **MS. WEAVER:** And if you're just sticking with teens,  
16 for example, there are all kinds of regulations in the real  
17 world --

18 **THE COURT:** But let me just ask you.

19 **MS. WEAVER:** Sure.

20 **THE COURT:** I mean, your response was --

21 You know. Say what's illegal about that.

22 And your response was that they didn't consent to that.

23 But looking at the Data Use Policy, I mean, you know,  
24 it's -- to be sure, it's not a model of clarity; but I think,  
25 you know, the message that emanates from the discussion of

1 other apps and the information that other apps can obtain is  
2 that if you share stuff with your friends, and your friends --  
3 if you share stuff with your friends, then your friends -- then  
4 third parties can access that information from your friends,  
5 unless you choose a particular setting in your -- on your  
6 Facebook page. Right?

7 And I can't remember --

8 **MS. WEAVER:** That's not exactly correct.

9 If that were correct, then maybe there would be a much  
10 stronger argument for Facebook.

11 The way they've set it up is when you --

12 **THE COURT:** Why is it not -- why is it not correct?  
13 I mean, it says --

14 **MS. WEAVER:** Yeah. Let me explain. So when you go  
15 to your Profile Settings, Your Honor --

16 **THE COURT:** Yeah.

17 **MS. WEAVER:** -- there's, like, a separate page. So  
18 they have --

19 First of all, let me just say the consent is very minor.  
20 There are at least, I think, 21 different -- there's the S --  
21 the Statement of Rights and Responsibilities.

22 And then they refer there to the Data Policy. And I'm not  
23 sure a regular Facebook user is going to sit down and read the  
24 Data Policy. It's called a Data Policy. And it's the Data  
25 Policy that talks about friends. And it doesn't include

1 friends of friends.

2 **THE COURT:** Well, that may be an issue, but --

3 **MS. WEAVER:** Yeah. No. Okay. So --

4 **THE COURT:** -- you contend that the Data Policy was  
5 breached.

6 **MS. WEAVER:** Right. So -- well, I don't know whether  
7 we're going to agree that there's a contract or not, frankly.

8 **THE COURT:** Okay.

9 **MS. WEAVER:** Maybe we're going to be talking about  
10 unjust enrichment from our side. We haven't decided that yet.

11 **THE COURT:** Okay.

12 **MS. WEAVER:** But just, sort of, on what is being --

13 So those two policies say, *Go to your Privacy Settings.*  
14 *You can control what happens here.*

15 And if you go to your Privacy Settings and you say, *I only*  
16 *want friends of friends to see these things, and I only want*  
17 *friends of friends to see these things, or just friends, or if*  
18 *you took the most-narrow restrictions, that doesn't control*  
19 *what happens to you.*

20 **THE COURT:** But that is in reference to people going  
21 to your page. Right? And who -- who can see stuff on your  
22 page? Only friends, or only friends of friends.

23 **MS. WEAVER:** Right --

24 **THE COURT:** But this --

25 **MS. WEAVER:** Right. So that's exactly right. Yeah.

1           **THE COURT:** But this Data Use Policy seems to say  
2 however -- even if you -- however you set up your page, if you  
3 share information with your friends, then people can -- third  
4 parties can obtain that information from your friends, unless  
5 you -- what's the -- hold on one quick second here -- unless  
6 you turn off all Platform applications. Right?

7           **MS. WEAVER:** Right. It's not just what you share  
8 with your friends. It's everything about you. So the entire  
9 profile through your friends -- so your weakest link betrayed  
10 you completely.

11           **THE COURT:** Okay.

12           **MS. WEAVER:** And that is not clear.

13           So -- and then -- and then it went -- so there's --

14           **THE COURT:** You mean they get -- you mean the  
15 third-party app gets something about you that your friend could  
16 not get --

17           **MS. WEAVER:** Yeah.

18           **THE COURT:** -- from looking at your page?

19           **MS. WEAVER:** First of all, I can't get it. I don't  
20 have what Facebook has collected on me. And they have this  
21 whole -- it's almost like a digital avatar. It's this massive  
22 document that they have created.

23           And this is what I'm saying. It's this one-way mirror,  
24 where they know exactly how to target and manipulate me.

25           And if you want to talk about laws -- I mean, again, this

1 is premature, and we're still analyzing this; but if I'm  
2 sitting in front of my television, and I get a political ad,  
3 and it's at all affiliated with a party -- you know, *This ad is*  
4 *associated with Candidate X, and I approve this message.*

5 What's happening on Facebook is there's no attribution to  
6 the content that's coming at you. There are all of these laws  
7 that are kind of lost in the ether.

8 **THE COURT:** You seem to be saying that it's unlawful  
9 to manipulate people.

10 **MS. WEAVER:** I'm saying it's unlawful to communicate  
11 advertisements that are in violation of the laws that regulate  
12 advertisements, without attributing anything to where they're  
13 coming from. And Facebook did not audit or control any of  
14 these messages.

15 I'm saying that when you're talking to teens, there are  
16 certain restrictions on the kinds of communications that can be  
17 made to people of a certain level. Those are supposed to be  
18 regulated; and everywhere else in the world they are, but not  
19 on Facebook.

20 **THE COURT:** Are there any teens who are named  
21 plaintiffs in these cases?

22 **MS. WEAVER:** Well, we haven't filed our Complaint  
23 yet; have we?

24 **THE COURT:** Okay.

25 **MS. WEAVER:** But setting that aside, it's adults.



1 It's, frankly, how law firms advertise. You have to -- you get  
2 the disclaimer. There are certain restrictions. There's all  
3 of this.

4 What's happening right now is all of this unregulated  
5 content is coming at you, without --

6 And so there are, going back --

7 Look. Under the UCL, what we need is a loss of personal  
8 property.

9 Now let's talk about property and economic harm. This  
10 case is very different. Facebook talks about average revenue  
11 per user. They have put a dollar value on each of us, based on  
12 the data that they get. They have an aggregate --

13 **THE COURT:** But what does that have to do with the  
14 economic harm that a user may have suffered from --

15 **MS. WEAVER:** Because they have taken something from  
16 me of value that I didn't agree to. And it's beyond the scope  
17 of what I thought. I mean, the consent is not, Oh, I  
18 understand --

19 **THE COURT:** Beyond the scope of what you bought?

20 You didn't buy anything.

21 **MS. WEAVER:** No. What I said: It's beyond the scope  
22 of what I consented to.

23 And, by the way, a purchase -- a barter does not have to  
24 be with dollars. I mean, let's assume --

25 **THE COURT:** That argument sounds like quite a stretch

1 to me.

2           **MS. WEAVER:** Well, but just hear me out. So I --  
3 let's say the average user says, *I know on Facebook it's free,*  
4 *but maybe they're going to, you know, follow my "Likes" or*  
5 *something like that.*

6           The value of that before these digital profiles were  
7 built, at one point in time, is very low.

8           It increased dramatically over time, as the weight -- and  
9 this became --

10           **THE COURT:** Oh, I agree with that.

11           **MS. WEAVER:** Yes.

12           **THE COURT:** But what's the economic harm to you --

13           **MS. WEAVER:** Yeah.

14           **THE COURT:** -- the user?

15           **MS. WEAVER:** Facebook is the broker. I could go sell  
16 that somewhere else. I don't have to be on Facebook. I can --  
17 well, no. But it's legitimate. I mean, there are other  
18 competing entities that gather this. There are marketing firms  
19 that gather this. You know, that --

20           **THE COURT:** That sounds like a pretty fanciful  
21 theory, but we'll have plenty of time to argue more about that,  
22 I assume.

23           **MS. WEAVER:** Yeah. That's an expert question. The  
24 initial question of: Am I harmed by the creation of this  
25 digital profile out there, where businesses are making

1 real-life decisions? I mean, in the HUD example, we're talking  
2 about businesses saying, *You don't get to have housing in this*  
3 *because of your race.*

4 When I signed up, I had no idea.

5 What about banks who have compiled my credit history,  
6 unbeknownst to me? And I haven't filed an application. And I  
7 file an application, and they are using this data that they  
8 have received back. And there's a difference. There's a  
9 period in time where Facebook was actually allowing third  
10 parties to collect the data when they queried the database,  
11 under API 1. So they actually possessed that information, and  
12 that's gone.

13 So that's another thing. Here I am, and I have this  
14 digital profile that is in the hands of third parties in  
15 foreign countries. And we can't ever get that back. And the  
16 risk of identity theft based on those very attributes is huge.

17 But Facebook will come in and tell you, *One of the reasons*  
18 *we're collecting, for example, how your mouse moves, is to*  
19 *confirm your identity.*

20 It's a tautology. They have already stolen my identity.  
21 They know exactly where I eat, what I pay, who my friends are.  
22 If somebody wanted to create a digital me, they can do it; and  
23 there's no safety restriction on this right now.

24 So without -- and this all happened without a sole -- that  
25 whole piece is the irreparable harm. That's the data breach.

1 That data is gone. It's in the ether. And it's a problem.  
2 It's a problem for security. It's a problem for financial  
3 institutions.

4 So -- and Facebook did that. They didn't audit. They've  
5 admitted they didn't audit Cambridge Analytica. They're  
6 investigating. They're trying to --

7 **THE COURT:** That's sort of a separate set of claims,  
8 I suppose.

9 **MS. WEAVER:** I agree.

10 **THE COURT:** I mean, there's this -- some of these  
11 claims are about, *Well, they took my information, and they --*  
12 *you know. I didn't consent to their taking and aggregating and*  
13 *collecting my information.*

14 And then there's this other sort of alleged wrongdoing  
15 that you might put in a different category, I suppose, which  
16 is: They made promises that the data was only going to be used  
17 consistent with Facebook's policies, but they were negligent in  
18 failing to live up to those promises.

19 **MS. WEAVER:** That's right.

20 And then maybe a third bucket, which is under, I would  
21 say, the UCL, which is an unfair-business claim.

22 **THE COURT:** Yeah, but I still --

23 I get the theory, whether it's a negligence theory or a  
24 breach-of-contract theory or whatever, but I'm still having a  
25 little trouble wrapping my brain around the Article III

1 question as it relates to that.

2           **MS. WEAVER:** This is concrete. I mean, if you look  
3 at the typical data-breach cases, look at what Judge Koh found  
4 in *Anthem*. Right? I mean *Anthem*, admittedly, was different,  
5 because they paid; but there are cases --

6           **THE COURT:** They paid. And there were -- you know,  
7 there was actual data stolen that could be used to engage in  
8 identity theft.

9           **MS. WEAVER:** How is that not this? There is this  
10 data that was stolen.

11           **THE COURT:** But I haven't heard you explain how it is  
12 this. Right? I mean, I haven't heard. I don't yet understand  
13 from what I've read thus far.

14           **MS. WEAVER:** Uh-huh.

15           **THE COURT:** I mean, it's not Social Security numbers.

16           **MS. WEAVER:** It's credit-card numbers. It's where I  
17 shop. It's my banking.

18           **THE COURT:** I haven't seen the credit-card number  
19 thing yet.

20           **MS. WEAVER:** Okay. We'll get that. You know.

21           **THE COURT:** I haven't seen reference to that.

22           **MS. WEAVER:** Yeah. It's actually in the media. And  
23 I don't actually have a Complaint citation right here, but it  
24 is financial information. It's where I bank.

25           For example, if you go, you can look, and they will tell

1 you the entities that they have let target you, which is  
2 banking institutions, et cetera. And they are matching  
3 information they already know about you. And then -- it's  
4 called -- I'm just learning this, myself, in depth. It's  
5 called "mapping."

6 So if a bank wants to target you for an ad, and Facebook  
7 already has information about you, it gets mapped. And you get  
8 a targeted ad that is based on all of the information the bank  
9 possesses on you.

10 And this is -- this is an opportunity for manipulation  
11 that's really never existed before.

12 **THE COURT:** Well, manipulation is different from  
13 identity theft.

14 **MS. WEAVER:** Okay. Fine.

15 **THE COURT:** Right? And, I mean, manipulation of  
16 people to get them to buy things or to get them to act in a  
17 certain way in the political arena, or whatever -- I mean,  
18 that's as old as our republic.

19 **MS. WEAVER:** But it's highly regulated, Your Honor.  
20 That's why we have laws about what political ads can say; what  
21 lawyers can say; what doctors can say. That's why, when I see  
22 an ad about a drug company, there's a thousand disclaimers  
23 about the many illnesses I might get.

24 This message -- this content -- is coming to users without  
25 any --

1           **THE COURT:** But that sounds -- to the extent you're  
2 complaining that people are being manipulated in -- you know,  
3 in violation of regulations about advertising, aren't you  
4 complaining about the third parties who are doing the  
5 manipulating, as opposed to Facebook?

6           **MS. WEAVER:** Well, Facebook is the one doing it,  
7 because they're the ones sending the message. You're right,  
8 Your Honor. This is exactly right. This is the third bucket.  
9 It's under the UCL; the unlawful prong. They don't comply with  
10 the regulations about how advertisements are done. It comes to  
11 me, and then I suffer harm because of that.

12           But I want to get back to the identity theft. I don't  
13 think -- I'm not prepared -- and maybe Derek has to talk about  
14 how -- I can't imagine anything that's more concrete than  
15 identity theft, than all of these factors in creating a  
16 fictitious person that applies for a loan online. They know  
17 where I live. They have my address. They have my name. They  
18 know where I bank. They have credit cards.

19           **THE COURT:** Well, that -- so -- and I will look  
20 forward to seeing that articulated in -- in a Complaint, I  
21 assume --

22           **MS. WEAVER:** Yes.

23           **THE COURT:** -- if you decide to go that route; but  
24 that sort of bleeds into the next question, which is: A number  
25 of times during our discussion, you know, we've gotten to a

1 point where you've said, *Well, I don't know. We're still*  
2 *deciding whether to include this claim or that claim. And*  
3 *we -- you know, we need to research this more.*

4 Every time you say that, it makes me think, well, maybe we  
5 shouldn't allow discovery to go forward now. Maybe we should  
6 see what's in the Complaint, so that we're not aiming at a  
7 moving target when we're trying to figure out what discovery is  
8 appropriate, and what discovery is not appropriate.

9 **MS. WEAVER:** I hear what you're saying, but what I  
10 can say is that when we had our very first hearing in front of  
11 Your Honor, you were --

12 And I get that you think you want to take the sneak peek.

13 I don't think that's the law. I mean, if you look at  
14 *Singh v. Google* and what Judge Labson Freeman held, it was:  
15 Only if you're going to deny a Complaint in its entirety  
16 without leave to amend, and the discovery will not bear on the  
17 claims -- that's when you stay discovery.

18 **THE COURT:** Well, I mean, to -- I think the real  
19 answer is that every case is different. And you have to look  
20 at the entire picture, and make a decision about whether  
21 discovery before 12(b)(6) is appropriate.

22 **MS. WEAVER:** Right.

23 **THE COURT:** And so I don't -- to the extent you're  
24 suggesting there is some rigid criteria that has to be met  
25 before you do allow discovery or prevent discovery, I don't



1 think that's right.

2       You know, every case is different. And you have to -- you  
3 look at the whole case, and think about -- you know, think  
4 about what makes sense from a cost standpoint; from the  
5 standpoint of the advancing the litigation. You have to  
6 balance everything.

7       Let me ask Mr. Lipshutz if he wants to --

8       Sorry. Did you want to add one?

9               **MR. LOESER:** Yeah. I was just going to add a couple  
10 thoughts on the discovery piece. And Your Honor can probably  
11 tell we're trying to divide issues, so that we each can focus  
12 on particular things. And so I'd like to just think out loud  
13 for a minute about discovery, because one of the things that I  
14 think is really unique about this case is we're in such a  
15 evolving landscape of what is happening; what Facebook is  
16 doing.

17       You know, their business has not stayed the same over  
18 time. It's changed significantly. In 2012 they had a  
19 Consent Decree with the FTC that alleged -- and they settled  
20 the claims about their misuse of privacy data. And they  
21 committed to a variety of things that they were going to stop  
22 doing; not that they never did them before and they're never  
23 going to do them again. But things they did the FTC said was  
24 wrong -- if they exposed privacy data, they had to stop.

25       And so now we're in a place where their business has

1 evolved, and they're doing things with data that are hard to  
2 understand, and they're hard to figure out. And you can read  
3 all of their disclosure statements. You can read the consent  
4 forms. You can read everything. You still don't know really  
5 what really is going on out there with this data. And that, I  
6 think, is where the discovery focused. What we really --

7           **THE COURT:** What about -- I -- I understand that,  
8 but -- but it's -- it's a -- discovery is also not supposed to  
9 be a fishing expedition. And assuming you get past the  
10 12(b)(6) stage, you will be able to figure out precisely --  
11 hopefully be able to figure out precisely what's going on.

12           What about -- you know, I guess one question I have is --

13           One thing I'm convinced of is that your discovery request  
14 is vastly overbroad, at least for this stage; but what about --  
15 there was reference -- there was a letter that Facebook sent to  
16 the Department of Commerce [sic] in the wake -- not the  
17 Department of Commerce; the Senate Commerce Committee --

18           **MR. LOESER:** Right.

19           **THE COURT:** -- in the wake of the hearings that took  
20 place back in June, or April, or whenever it was. And Facebook  
21 noted that it was conducting an investigation of these  
22 thousands of third-party apps. And it had made a decision to  
23 suspend about 200 of those apps, pending further investigation  
24 of, you know, misuse of data.

25           What about just -- what about limiting discovery to just

1 those -- those -- you know, the 200 or so third-party apps  
2 referenced in that letter.

3 **MR. LOESER:** Yeah. Well --

4 **THE COURT:** Sort of get all, you know, nonprivileged  
5 documents relating to that, and be able to do some  
6 interrogatories about that, and whatnot.

7 **MR. LOESER:** You're either reading my mind, or mine  
8 yours, but we have tried. You know, after getting Facebook's  
9 brief, you know, we looked at their objection to the breadth.  
10 We looked at our request. And we started trying to figure out:  
11 How can we narrow these things? How can we get information  
12 that really goes directly to the argument we know they're going  
13 to make? And I think that that's a very good idea.

14 And so, for example, if you look at our first request in  
15 our brief, which sets forth this, you know --

16 **THE COURT:** Just narrow it all to those 200 apps?

17 **MR. LOESER:** Narrow it all.

18 And we would have a description. It would be limited to  
19 third parties Facebook has determined improperly accessed or  
20 sold Personal Data of Facebook users.

21 That answers this question like --

22 **THE COURT:** So it wouldn't even necessarily be the  
23 200. It would be, of the 200, however many Facebook has  
24 determined improperly sold data.

25 **MR. LOESER:** Yeah. We'd be more than happy to get

1 the 200; but really, I think one of the tasks we're trying to  
2 sort out is: Is Cambridge Analytica unique, or is it not?

3 Now, when Cambridge Analytica got all of that this data,  
4 it was under this API system, where third parties could simply  
5 -- or Kogan could go in, and get everything about me.

6 And then they were supposed to change that policy with the  
7 Consent Decree, and it wasn't supposed to happen anymore; but  
8 there were a lot of entities that got that data.

9 We would like to know -- I think it would be very useful  
10 for understanding -- who are these other entities that Facebook  
11 has identified?

12 What was the data?

13 Because that goes to the exact factual arguments that  
14 Facebook is making about the kinds of information; like, in  
15 their brief, they keep talking about, *There's nothing*  
16 *inappropriate about our disclosing the information that*  
17 *Facebook users share.*

18 Well, that's not at all what that case is about. It  
19 really -- it's not about the "Likes" and -- and things that  
20 people are sharing.

21 It's about all of that other information that Facebook is  
22 going outside of Facebook and getting. So let's identify who  
23 are the other entities. What did they get? What did they do  
24 with it?

25 And the same question for Cambridge Analytica. To the

1 extent there's anything opaque still, like What was it? Who  
2 was it? What was done with it? Where is that data now?

3 And that would help us. That will address the very issues  
4 that, Your Honor, you know you're going to face. They're going  
5 to make a standing argument. We know exactly what the  
6 arguments are, because they put them all in their brief.  
7 They're about the nature of the data -- What was it? -- about  
8 how it was used; and about whether it exceeds the consent.

9 So if we focus on that information, I think we can get you  
10 a Complaint that has the facts that we would simply have to  
11 amend and add after we got that information.

12 **THE COURT:** Well, you're saying if we don't do any  
13 discovery, we're just going to have to amend the Complaint  
14 again later?

15 **MR. LOESER:** I think --

16 **THE COURT:** I mean, I assume that we'll go -- you  
17 know, say this case gets past 12(b)(6). Assume, regardless,  
18 there are going to be several iterations of the consolidated  
19 Complaint. Right?

20 **MR. LOESER:** I think that's right, but I think  
21 probably more so, even, than other cases, because it's not like  
22 you can pick up anything Facebook has said, and understand:  
23 Who are these other apps? What did they get? What did they  
24 do? What did they do with it?

25 And if you look -- and I did try and capture a few of the

1 arguments; the specific arguments that Facebook is making.

2 They say that, for example, the data, itself, that we claim was  
3 improperly accessed or shared doesn't have any value.

4 Well, you know, that's a strange thing for Facebook to  
5 say, since 98 percent of its revenue comes from selling access  
6 to that data.

7 They say that everything that was disclosed -- there was  
8 consent.

9 Well, you know, how do you brief that argument, if we  
10 still don't have from them a description of, well, what was  
11 everything that was disclosed?

12 And so, I mean, you can go through every argument that  
13 they're making. And their fundamental point is they claim that  
14 we're putting the cart before the horse in trying to get this  
15 information; but frankly, they've put these factual arguments  
16 forward already. And I think we can identify specific  
17 information necessary so the Court can evaluate those  
18 arguments -- those factual arguments they're making -- with  
19 this limited discovery that will help us answer that.

20 So I do think, you know, our thinking has evolved. I'm  
21 hoping Facebook's thinking has evolved. We can narrow.  
22 Your Honor's suggestion is a good one. Narrow the discovery  
23 down.

24 The other category that's out there are prior Government  
25 productions.

1 And frankly, the reason why we're focused on those is that  
2 in other cases that's an easy, low-hanging-fruit type of thing  
3 to deliver, because there's no burden associated with  
4 delivering it.

5 Here, one thing we could do -- our request is broad: All  
6 Government productions. But frankly, we could narrow that.  
7 And we've talked very briefly to Mr. Lipshutz about narrowing  
8 that just to -- for example, the FTC investigation. That's --  
9 obviously, they are looking at the same things that this case  
10 is looking at. That's information that has been packaged. You  
11 know, it's gone to out to them. So that's easy, and it  
12 eliminates what usually is the objection to early discovery,  
13 which is burden.

14 **THE COURT:** Mm-hm.

15 **MR. LOESER:** So I think you put those two things  
16 together. We have a narrow request. We are sensitive to the  
17 notion of asking for too much.

18 The brief -- you know, we tried to describe the categories  
19 in a way that identified the types of information; but we can  
20 get that information through a narrower approach, such as what  
21 Your Honor is suggesting.

22 **THE COURT:** Mr. Lipshutz.

23 **MR. LIPSHUTZ:** Good morning, Your Honor.

24 Well, I have to say, having listened to my opposing party

25 --

1           **THE COURT:** I mean, the main thing I want you to  
2 respond to is the idea of the narrower discovery, along the  
3 lines of what we've just discussed.

4           Let's say the 200 apps that Facebook told the Senate  
5 Commerce Committee it was investigating and/or, you know, the  
6 materials produced to the FTC.

7           **MR. LIPSHUTZ:** Sure, Your Honor. I will address  
8 those.

9           Let me just start by saying that we're only four weeks  
10 away from the filing of a Complaint. And so I think the proper  
11 place to start discussions is: What's the rush? Right?

12           In four weeks we should know, hopefully, what the theory  
13 of the case is, and who the plaintiffs are. We don't know that  
14 right now. And then nothing speaks to that further than the  
15 colloquy that Your Honor just had with plaintiffs' counsel.  
16 They don't know what the case is. They've said housing  
17 discrimination, medical records, you name it -- they seem to  
18 think that all of Facebook is illegal.

19           That's not what the case is. That's not what the case is  
20 going to be.

21           **THE COURT:** It does seem that they think that all of  
22 Facebook is illegal.

23           **MR. LIPSHUTZ:** It does, Your Honor. And their  
24 discovery requests, frankly, reflect that. They now describe  
25 their discovery requests as being overbroad, but if you read



1 the discovery requests that they put into their brief that  
2 Your Honor ordered, it asks for everything; every app. And we  
3 have 80 million apps.

4 (Reporter requests clarification.)

5 **MR. LIPSHUTZ:** 80 million apps on the Facebook  
6 platform.

7 **MR. LOESER:** If we could just have one line on each  
8 app --

9 **MS. WEAVER:** And the record.

10 **MR. LIPSHUTZ:** In the proper course of procedure, we  
11 would wait to see what the Complaint actually says.

12 And the discovery that is being sought, of course, has to  
13 be tied to the claims that they're seeking. We don't know what  
14 these claims are yet. We do know that we are going to have  
15 substantial defenses to whatever those claims will be, based on  
16 the various descriptions we've heard.

17 So Your Honor has heard and read the arguments not only  
18 about standing, which is a significant issue. Frankly, there's  
19 square case law on the identity-theft; on what we've just heard  
20 described. There's a notion of buying the identity-theft  
21 protection.

22 **THE COURT:** But it strikes me that on the issue of  
23 standing -- let's take identity theft. It's easy for a  
24 plaintiff to allege -- it seems to me in a case like this, it  
25 would be easy for a plaintiff to allege facts from which you

1 would conclude that it was reasonable for somebody to purchase  
2 identity-theft monitoring. Right?

3 Whether those facts turn out to be true, of course, is  
4 another question. Right?

5 But the point that I'm trying to get at, and I'm not doing  
6 it in a very artful way, is there is -- you know, at least in  
7 the Ninth Circuit there are facial standing challenges, and  
8 factual standing challenges. Right?

9 **MR. LIPSHUTZ:** Sure.

10 **THE COURT:** And, you know, it kind of seems like your  
11 standing challenge may end up being more of a factual standing  
12 challenge, which is, of course, something that happens after  
13 discovery -- right? -- because if they allege that, you know,  
14 Facebook -- that, you know, third parties had access to our  
15 credit-card information, and our name, and where we live, and  
16 et cetera, et cetera, then they are going to have a sufficient  
17 allegation of standing as it relates to identity theft. It may  
18 turn out not to be an accurate allegation, but they're going to  
19 have the allegation. And they're going to get past a 12(b)(1)  
20 motion; at least a facial standing challenge. Right?

21 **MR. LIPSHUTZ:** Respectfully, Your Honor, I don't  
22 agree with that. The United States Supreme Court, in the  
23 *Clapper* decision, flatly disagreed with that. That was at the  
24 pleadings stage.

25 **THE COURT:** Yeah, but that's not a case about

1 identity theft, and the need to spend money for fear of  
2 identity theft.

3 It's a -- there are lots of cases that have been decided  
4 since *Clapper* that say, *If somebody -- if your Social Security*  
5 *number has been stolen, and you need it to purchase*  
6 *identity-theft monitoring, that gives you Article III standing.*

7 **MR. LIPSHUTZ:** Of course, Your Honor, if your Social  
8 Security number has been stolen, I'd agree with you. The  
9 thing --

10 **THE COURT:** Or, I assume, your credit-card number.  
11 Right?

12 **MR. LIPSHUTZ:** Perhaps that's correct, but I don't  
13 think named plaintiffs can make that allegation consistent with  
14 their Rule 11 obligations. There's no factual basis for that.

15 And there's a difference between a user giving that  
16 information to Facebook, which is actually what was described  
17 by opposing counsel. If a user voluntarily gives that  
18 information to Facebook, that's not identity theft. That's  
19 very different from somebody else stealing the information.  
20 And I don't think there's any way for them to allege --

21 **THE COURT:** What? But their argument is that, to the  
22 extent Facebook had access to this information, there was no  
23 permission to give other -- give third parties access to the  
24 same information.

25 **MR. LIPSHUTZ:** But that's flatly contradicted by the

1 contract between the parties and Facebook. And that is  
2 something Your Honor should consider.

3 There are lots of cases throwing out, on 12(b)(6) motions,  
4 allegations that are inconsistent with Facebook's contracts.  
5 So I don't -- I do think that's standing will be at least a  
6 significant problem for them. Whether they eventually overcome  
7 it or not remains to be seen, but the point is --

8 **THE COURT:** What's wrong with -- what's the harm with  
9 allowing discovery on the material that's been produced to the  
10 FTC, and, you know, material relating to this investigation  
11 that Facebook has conducted of these 200 apps referenced in the  
12 letter to the Senate Commerce Committee?

13 **MR. LIPSHUTZ:** Respectfully, Your Honor, there's a  
14 lot wrong with that.

15 With respect to the FTC investigation, the FTC  
16 investigation is confidential. Under statute, even the  
17 existence of an FTC investigation is confidential. Now, it  
18 happens to be the case that here, it was leaked; but the  
19 existence of that investigation is confidential. And certainly  
20 the scope of that investigation is also confidential.

21 **THE COURT:** Well, I mean, I assume that you might  
22 need to get --

23 Maybe you need to get consent from the FTC before turning  
24 it over. I don't know.

25 But if the FTC didn't object to Facebook disclosing to the

1 plaintiffs whatever information Facebook has disclosed to the  
2 FTC in connection with this investigation, what's the problem?  
3 What's the harm in disclosing it to the plaintiffs in  
4 connection with this litigation?

5 **MR. LIPSHUTZ:** There are several problems,  
6 Your Honor. First of all, documents produced to the FTC are  
7 produced pursuant to this 2012 Consent Order that was entered  
8 into between Facebook and the FTC.

9 The FTC has a right, under that Consent Decree, to ask for  
10 documents pertaining to a wide range of subjects that, frankly,  
11 have nothing to do with even what was described here today. So  
12 actually the scope of any productions given to the FTC would be  
13 significantly potentially broader or different than what could  
14 possibly be encompassed by their Complaint.

15 **THE COURT:** Okay, but I feel fairly confident that  
16 Facebook kept careful track of what it gives to the FTC; and  
17 that it would not -- in the grand scheme of things, would not  
18 be terribly difficult for Facebook to pull out what would be  
19 relevant to this case from the materials it gave the FTC.

20 **MR. LIPSHUTZ:** Well, I disagree with that,  
21 Your Honor. We don't know what's relevant to this case,  
22 because we don't know what this case is about.

23 Second of all, it's not easy to do that, because Facebook  
24 would have to re-review all of that information. The documents  
25 that were produced to the FTC were not produced to pursuant to

1 the Federal Rules. They would have to review all of that  
2 information again; make objections; assert privilege; things  
3 that were not able to assert in connection with the FTC. It's  
4 a very different process.

5 Civil discovery under the Federal Rules is a very  
6 different process from responding to an FTC request that is  
7 pursuant to a Consent Order. There are different sets of the  
8 documents. There's no overlap.

9 And Judge Alsup, in the *In Re: Graphics* decision,  
10 addressed this exact situation. And he said, *There would be*  
11 *the issue of various objections that might be assertable*  
12 *against Plaintiffs that were unasserted against the Government.*  
13 *Defendant would be entitled to interpose possibly valid*  
14 *objections that would take time to evaluate. And regardless of*  
15 *the foregoing, the compelled act of turning records over to the*  
16 *Government pursuant to the subpoena does not mean that everyone*  
17 *else has an equal right to rummage through the same records.*  
18 *Defendants have a legitimate interest in maintaining the*  
19 *confidentiality of their records.*

20 We would assert that all of that presents enormous  
21 problems here, where the FTC investigation, itself, is  
22 confidential. The scope of that investigation is confidential.  
23 And the process of producing documents to the FTC, which, by  
24 the way, included communications with the FTC; letters back and  
25 forth. Undoubtedly, the FTC would not want that produced, and

1 certainly wouldn't give back our confidentiality --

2 (Reporter requests clarification.)

3 **MR. LIPSHUTZ:** Would not want that produced, and  
4 neither would Facebook.

5 And so there is no way to simply turn over that package of  
6 material consistent with the Rules. It would involve  
7 significant burden on our part.

8 **THE COURT:** Okay. What about the 200 apps?

9 **MR. LIPSHUTZ:** Well, the 200 apps that are being  
10 referenced are in connection with an internal investigation  
11 that Facebook is undertaking that is -- that Facebook has  
12 undertaken in response to Cambridge Analytica events. Facebook  
13 undertook a -- is in the process of undertaking an internal  
14 investigation, where it is investigating apps and their use of  
15 data. That investigation is privileged, and is being  
16 undertaken at the direction of counsel. And --

17 **THE COURT:** But that doesn't mean that every document  
18 you uncover in that investigation is privileged. It just means  
19 that the strategic aspects of the investigation are privileged.  
20 Right?

21 **MR. LIPSHUTZ:** Well, I don't know if that's correct,  
22 Your Honor. The --

23 **THE COURT:** The fact of the investigation is not --

24 **MR. LIPSHUTZ:** The fact of the investigation is not;  
25 but the identity of the apps being investigated, and the

1 reasons for investigating those apps certainly would fall under  
2 attorney-client privilege and attorney work product.

3 The 200 apps that are being referenced -- I believe the  
4 purpose of using that number has to do with apps that Facebook  
5 has suspended, pending the investigation. So no finding of  
6 wrongdoing on our part. Those are essentially the apps that  
7 are being investigated. And the results of that investigation  
8 are not complete. The company doesn't have --

9 **THE COURT:** But so what?

10 I mean, what's wrong about with identifying the apps that  
11 have been suspended, and producing all documents relating to  
12 the reasons why the apps have been suspended, and the  
13 relationship that Facebook has with those apps, and the kind of  
14 data that Facebook has shared with those apps?

15 **MR. LIPSHUTZ:** Well, first, because --

16 **THE COURT:** Given access. Given those apps access  
17 to.

18 **MR. LIPSHUTZ:** For a number of reasons, Your Honor.

19 First, because it's privileged. The identity of the apps  
20 being investigated. And the -- and the reasons for --

21 **THE COURT:** Why?

22 **MR. LIPSHUTZ:** Because the reasons for selecting --  
23 the basis for the investigation is to figure out what legal  
24 obligations Facebook has vis-à-vis those apps, whether it's  
25 potential affirmative litigation that Facebook may want to



1 launch against those apps; defensive litigation, like the one  
2 proposed here. It's all being conducted under the guidance and  
3 direction of counsel.

4 The apps, themselves -- by definition, if you're only  
5 asking about apps that are under investigation, by definition,  
6 you are broader in scope than the potential scope of this  
7 litigation.

8 These are apps that are suspected, potentially, of  
9 violating Facebook's policies. It has nothing to do with  
10 wrongdoing on Facebook's part. These are apps that Facebook is  
11 looking at to determine whether they violated Facebook's  
12 policies. That's not relevant, frankly, to the litigation,  
13 because --

14 **THE COURT:** Well, it is, potentially.

15 I mean, I spoke with Ms. Weaver about one bucket of claims  
16 which relates to Facebook not doing a good job of policing what  
17 is happening to this data --

18 Right?

19 **DEFENDANT LIPTON:** Yes, Your Honor.

20 **THE COURT:** -- despite promises to users that it  
21 takes care to protect their data.

22 **MR. LIPSHUTZ:** That was one of many theories  
23 discussed; but again, we have to find out whether that's a  
24 viable theory. And, as we set forth in our brief, we have an  
25 addendum that went through negligence, among many other

1 possible causes of action.

2       We've identified significant problems with bringing a  
3 negligence action here. These are contractual relationships.  
4 There's no negligence under California law in the context of a  
5 contractual relationship like this, unless there's a special  
6 relationship, which clearly does not exist here. The Data Use  
7 Policy and the consent that is on the face of the Data Use  
8 Policy prevents there from being any negligence, because  
9 there's actually a waiver in the Data Use Policy that says that  
10 Facebook -- that users waive any possibility of litigation  
11 against Facebook or liability by Facebook for the acts or  
12 actions of third-party apps. So on the face of the contracts,  
13 alone, there clearly can be no negligence cause of action here.

14       Plaintiffs mentioned a UCL cause of action. Prop 64 makes  
15 that impossible. There's no loss of property or money here.  
16 These are intangible harms, at best, as there's no possibility  
17 of UCL action here.

18       So there's simply no fire. There may be a lot of smoke,  
19 but there's no fire. There's no cause of action. And there's  
20 really no reason not to wait four weeks to find out what  
21 they're actually going to allege and who the plaintiffs are  
22 going to be, at which point we can file a motion to dismiss.

23       We -- if you'd like, Your Honor, we can file another  
24 motion to stay discovery; concurrent motion to dismiss.

25       **THE COURT:** As a practical matter, you're not asking

1 to wait four weeks. You're asking to wait until after a ruling  
2 on your motion to dismiss.

3 **MR. LIPSHUTZ:** That's right, Your Honor, but what I  
4 was trying to say -- if Your Honor is not convinced that we  
5 should wait that long, we could wait; see the what the  
6 Complaint says. We could file a motion to dismiss; a formal  
7 motion to stay discovery in connection with that motion to  
8 dismiss, which is the normal process here in the Northern  
9 District of California. That way, you can see how the motion  
10 to stay relates to the motion to dismiss, and decide whether  
11 they have any viable claims, and what the scope of those claims  
12 is.

13 **THE COURT:** Okay.

14 **MR. LOESER:** Your Honor, if I may, this comes down to  
15 a bit of Facebook having to pick a horse.

16 So they took their time in their motion to describe for  
17 you the grounds on which they intend to move to dismiss the  
18 Complaint. They are inherently and completely fact-based  
19 arguments.

20 So just my going through --

21 **THE COURT:** They've got to wait until you pick your  
22 horses before they pick their horses.

23 **MR. LOESER:** Well, they have a pretty good idea from  
24 30 Complaints. And we're going to refine the claims and  
25 allegations, but everybody knows the case is because of the

1 Cambridge Analytica event, and whether that same thing is  
2 happening with other apps. And we know from the limited  
3 disclosures that have been made to Congress that there might be  
4 many more. There are these 200 that are identified that are  
5 under investigation. So it could be much broader in that  
6 sense.

7 **THE COURT:** Could I? Let me -- sorry. Just one  
8 small question came to my mind. I don't know how small it  
9 really is; but do we even know at this point what information  
10 was given to Cambridge Analytica? Do we have -- well, or what  
11 information was obtained by Cambridge Analytica?

12 **MR. LOESER:** We have a general description, but --  
13 and that's a really important question. And, again, it shows  
14 how factual these arguments that Facebook wants to make.

15 **THE COURT:** Mm-hm.

16 **MR. LOESER:** What information is in a Facebook User  
17 Profile?

18 **THE COURT:** Mm-hm.

19 **MR. LOESER:** Mr. Lipshutz wants to say, over and over  
20 again -- and their brief says in several instances -- it's  
21 based on the information shared by users on Facebook. And  
22 that's a very convenient way of describing it, because that's  
23 information that people made available on Facebook, and made  
24 available, under certain restrictions, to their friends.

25 But what we've learned from the scandal and the fallout

1 from Cambridge Analytica is that there's a tremendous amount of  
2 additional information that is collected not from -- well, both  
3 from Facebook users' actions -- not their "Likes" and other  
4 posts; but, you know, their eye movements and mouse movements,  
5 all of these other bizarre things that are being tracked.

6 Then there's this universe of other information, which,  
7 frankly, is what I'm concerned about. What other information  
8 is being gathered when Facebook goes out into the world, pulls  
9 information? Is it financial information? Is it health  
10 information? Because that is directly relevant to these  
11 factual arguments that Facebook wants to make to attack  
12 standing, and to attack the claims.

13 And so I think it's a very sound idea to require Facebook  
14 to do something that is not unusual in litigation of this type:  
15 Put forward some information that will make this exercise of  
16 motions to dismiss meaningful.

17 Otherwise, it takes months. These motions to dismiss --  
18 you know, Your Honor probably gets tired of reading 50-page  
19 briefs, or however long they get, with massive attachments; but  
20 it is a long process. It will be months before the motion is  
21 briefed, heard, decided. And then we'll just have to do it all  
22 over again on these basic questions of: What data is  
23 collected? Who accessed it? How was it accessed?

24 And if we can at least narrow it down to -- for the  
25 entities that Facebook has identified, in its own worldview,

1 have misused the data, then let's look at those, because that  
2 will allow us to put a Complaint forward that puts the  
3 information together that directly rebuts the factual arguments  
4 that we think they're going to make.

5 Otherwise, you know, you're just going to have a motions  
6 practice where they say, *We didn't collect any data, other than*  
7 *what was shared on Facebook. It's a fact issue. No data was*  
8 *accessed, other than what people gave permission to access.*  
9 *It's a fact issue. No data was sold. It's a fact issue.* And  
10 you're going to go down the whole list. It's just kind of a  
11 useless exercise. And we'd like to make it more meaningful for  
12 the parties and for the Court.

13 **MR. LIPSHUTZ:** Your Honor, our motion to dismiss and  
14 our papers here are not presenting fact issues. They're simply  
15 take the allegations, and they compare and contrast them with  
16 Facebook's own contracts, which are going to be incorporated  
17 into the Complaint. There's no fact issue, and there won't be  
18 a fact issue in our motion to dismiss. It will be legal  
19 arguments.

20 **MR. LOESER:** Well, just one final thing on that, Your  
21 Honor. Look at Cambridge Analytica. There was a contract.  
22 Okay? If we're going to take their view of how to decide the  
23 world, there would be no Cambridge Analytica, because the  
24 contract did not allow, apparently, what Cambridge Analytica  
25 did. So the answer can't be Facebook's contracts, by itself.

1 It also has to look at what actually happened with the data.

2 **MR. LIPSHUTZ:** Cambridge Analytica violated  
3 Facebook's contract with Cambridge Analytica; but there's no  
4 allegation and there can be no allegation that Facebook  
5 violated its User Agreement with Cambridge Analytica.

6 **THE COURT:** All right. So I will take that under  
7 submission. I'll issue a ruling very shortly.

8 There are a couple of things that I wanted to flag for you  
9 all. And then if there's anything else you want to discuss  
10 with me or update me on --

11 First, there's a Ninth Circuit decision that came out a  
12 few days ago that I haven't read yet on judicial notice; taking  
13 judicial notice of documents that are incorporated into the  
14 Complaint. That is going to be an issue that you all need to  
15 think about. And I just want to -- I can't remember the name  
16 of the case, but it came out a few days ago.

17 **MR. LIPSHUTZ:** I read the case.

18 **MS. WEAVER:** *Khoja v. Orexigen*.

19 **THE COURT:** And then there are a couple cases which,  
20 again, I haven't looked at yet, but speak to this question that  
21 we spoke of last time, which is: What becomes of the claims  
22 asserted by plaintiffs in the 30 cases that don't make it into  
23 the Consolidated Complaint? And I know that Judge Fuhrman has  
24 dealt with that issue in his MDL.

25 There was one other case -- again, I haven't read them

1 yet, but I just wanted to make sure I have brought them to your  
2 attention. Yeah. Judge Fuhrman in SDNY in the *General Motors*  
3 *Ignition Switch Litigation*.

4 And then Judge Selna, in Los Angeles, in the  
5 Central District, has dealt with this issue in the Toyota MDL.

6 There may be others, but I wanted to just bring those to  
7 your attention.

8 Anything anybody wants to update me on?

9 **MR. LOESER:** Yeah. First, on that -- the last issue,  
10 on claims and what's going to happen with them, we have been  
11 putting a lot of time into trying to sort that out. And what  
12 you'll see when you read Judge Fuhrman's decision is it is a  
13 very complicated issue, and there are different ways to handle  
14 it, which is why, in one of the orders we submitted on Lead  
15 Counsel duties and responsibilities, we sort of created  
16 flexibility; that the two approaches are -- one is you dismiss  
17 those claims without prejudice, as Judge Fuhrman did. You set  
18 in motion this process for briefing on those claims, so people  
19 can reassert those claims. That approach makes particular  
20 sense where you have a lot of ancillary litigation.

21 **THE COURT:** At the tail end, sort of?

22 **MR. LOESER:** No. He has it set up so it happens -- I  
23 mean, that whole discussion in that case kind of happened  
24 midstream. So there's a lot of reasons why that approach may  
25 be somewhat unique, and not terribly helpful here; but



1 midstream in the process on one of the Consolidated  
2 Complaints -- not the first one -- claims had been dismissed.  
3 Parties that had ancillary litigation were upset about that,  
4 and wanted an opportunity to try and argue for those claims to  
5 be included again.

6       There are some benefits to that. The down side is it  
7 creates a lot of kind of ancillary litigation over the claims.  
8 And so I think we really have to think about if we want to do  
9 that.

10       The other approach that a lot of courts have followed is  
11 to simply have all of the claims get included in the  
12 Consolidated Complaint -- every single one of them -- and then  
13 have a prioritization by Lead Counsel over, *These are the*  
14 *claims that we want to deal with now. Let's stay these other*  
15 *claims.* That, I think, is a more efficient way.

16       **THE COURT:** I think Judge Koh may have done it that  
17 way in the *Anthem* case.

18       **MR. LOESER:** Yeah.

19       **MS. WEAVER:** And in *Apple*. Judge Davila's handling  
20 those claims.

21       **THE COURT:** Yeah.

22       **MR. LOESER:** Yeah. And there's good reason for that.  
23 It does prevent a lot of all of this, sort of, side litigation  
24 by other parties. So we're thinking through that. And the  
25 order provides some flexibility.

